United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-1373

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------X

UNITED STATES OF AMERICA, :

Appellee, :

- v - : Docket No. 76-1373

BENJAMIN GENTILE, :

Appellant. :

----------X

REPLY BRIEF FOR APPELLANT BENJAMIN GENTILE

Appeal From A Judgment Of
Conviction In The United
States District Court For
The Southern District Of
New York

HOWARD L. JACOBS, P.C.
401 Broadway
New York, New York 10013
Attorney for Appellant
Benjamin Gentile

HOWARD L. JACOBS
DONALD E. NAWI
Of Counsel

TABLE OF CONTENTS

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------X

UNITED STATES OF AMERICA, :

Appellee, :

- v - : Docket N. 76- 1373

BENJAMIN GENTILE, :

Appellant. :

----------X

REPLY BRIEF FOR APPELLANT BENJAMIN GENTILE

POINT I

SACCO'S PRO SE REPRESENTATION DID INDEED PREJUDICE GENTILE

Sacco may have been entitled to represent himself (Government Brief "GBr" 16*). The Government, however, had no right to a joint trial in which exercise of that right deprived Gentile of his right to a fair trial. It is not that a severance had to be granted (Ibid) merely because Sacco was pro se. It is that a constant series of clashes, mistatements, and errors collected in our earlier Brief and Appendix made the joint trial a joke for Gentile

1. Sacco stated to the jury that Gentile would testify when Gentile's lawyer made no such statement to Sacco. If Sacco had

asked him, he would have told that to Sacco and would have stopped him from mentioning Gentile in his opening (A 66A). That Sacco went ahead to say Gentile would testify without speaking to Gentile's attorney, was ridiculous. GBr 11 notwithstanding, Sacco had no right to do that.

2. GBr 12 cautiously admits that Sacco "may have strayed slightly from recounting Robbins' testimony" when he interjected that the origin of the illegal $1,000 loan was discussions between Gentile and Sacco. This was no "slight straying." It took away any arguments from gaps in the Government's proof about Gentile's role and placed him squarely as a participant in Sacco's framing of the usurious loan proposal.

3. The Government looks to Sacco's reputation evidence and urges that a little of it applied to Gentile as well and that all of it might have come in at a separate trial (GBr 13). That is exactly the point. With a trial already so devastatingly full of proper prejudicial material, it was essential to keep out the improper (Brief for Gentile "DBr" 11). That was not done. Sacco's questioning of Robbins was, the Government admits (GBr 14), "pointless and inept." His eliciting of testimony from Mrs. Robbins and Iodice about the loan was what helped bring about Gentile's concessions (GBr 14) not the strength of the Government's case. His summoning of a witness who promptly invoked the Fifth Amendment about a loan to Robbins (A 93, DBr 12, GBr 14*) showed another individual with a lengthy criminal record involved with him and

Gentile, who was claiming that the transaction violated the law. Sacco lacked, the Government tells us (GBr 15), "legal acumen." And while the Government sees no "conscious or unconscious" attempt to undermine his co-defendants in the eyes of the jury (GBr 15), that flies squarely in the face of the district court's remarks that Sacco was "using this courtroom for [his] own purposes and not for this case" (A 91); acted "deliberately and for [his] own personal motivations and not for any purposes in this trial" (Ibid); and "exceeded the bounds of what has been given to [him], the liberty that has been given ... in this case" (A 80).

POINT II

GENTILE WAS HARMED BY THE DOOLEY'S TAVERN TESTIMONY

The Government goes to great lengths now to show that it had no use for the Estler and Goetz testimony at trial (GBr 20). But the Government put them on the stand, not Gentile. And it did so with a specific purpose. Its case against Gentile was that he was Sacco's collector. Payments were being taken to Dooley's. Dooley's was Sacco's headquarters. Dooley's was where threats were made. Gentile as extortionate collector was probably not sustainable without the Agents' specific observations because the rest of the proof on that was so full of uncertainties and contradictions

(DBr 7-8). The Agents' testimony, therefore, clearly affected a substantial portion of the Government's case, assuming that is the test we must meet (GBr 19-20).

We have reviewed the Government's arguments on Estler and Goetz. There is clear and uncontradicted record evidence that the Westchester District Attorney, based on the wiretaps, led the SLA (i.e., Estler) to go to Dooley's in April 1970 (DBr 14-15). The Government's present nonsense about "negative inferences" (GBr 19-20) cannot shift back to Gentile the obligation this proof plainly placed on it to demonstrate an independent source for the SLA visit. This it did not do. This in itself would be enough to invalidate the Gentile conviction, although we note that the Goetz testimony was also tainted because of the Government's failure to demonstrate the reason for the Organized Crime Strike Force interest in Dooley's (GBr 19). There were so many coincidences, and the timing was so close, that unless the contrary is shown, the clear inference is that all the State activity was not unknown to the federal authorities. No such showing was made.

Respectfully Submitted,

Howard L. Jacobs, P.C.
Attorney for Appellant
Benjamin Gentile

Howard L. Jacobs
Donald E. Nawi

Of Counsel

Certificate of Service

United States V. Gentile, Docket No. 76-1373

I certify that on July 15, 1977 I mailed one copy of the Reply Brief of Appellant Gentile to Robert Fiske, Esq., United States Attorney, One St. Andrews Plaza, New York, N. Y. 10013.

Donald E. Nawi

Donald E. Nawi